No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections provided by the Fourteenth Amendment's Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

Central to the constitutional guarantee that all persons are entitled to "due process of law" is a commitment to an impartial justice system. As James Madison noted at our nation's founding, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999). Thus, this Court has long recognized—and reiterated just six years ago—that "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This case presents a

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief.

judicial conflict of interest so extreme and so obvious that it contravenes that fundamental commitment to impartial justice.

In 1986, Petitioner Terrance Williams was convicted of murder and sentenced to death in Pennsylvania state court. At the time of Williams's trial and sentencing, Ronald Castille was the elected district attorney of Philadelphia. In addition to heading the office that prosecuted Williams, Castille personally authorized the pursuit of a death sentence in Williams's case. Although Williams's direct appeal and his initial request for post-conviction relief were unsuccessful, a post-conviction court in 2012 found that relevant evidence, namely, evidence that Williams had been the victim of sexual abuse at the hands of the man he killed, "was plainly 'suppressed.'" J.A. 126a. That court accused the trial prosecutor of "'gamesmanship,'" noting that the "pattern of nondisclosure . . . calls into question the trial prosecutor's intent as the architect of [the] prosecution." *Id.* at 145a; *see id.* at 75a n.23 ("Intentionally rooting evidence out of the . . . prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes 'gamesmanship.'"). The court also explained that the suppressed evidence would have explained "how [the victim's] sexual advances amounted to a mitigating 'circumstance of the offense.'" *Id.* at 102a. Based on these findings, the post-conviction court stayed Williams's execution and granted him a new penalty hearing. The state immediately appealed.

By the time of that appeal, district attorney Ronald Castille had been elected Chief Justice of the Pennsylvania Supreme Court, and Williams filed a motion requesting that Castille recuse himself or, at least, refer the motion to the full court for decision.

Despite the fact that Castille was head of the district attorney's office during Williams's trial and sentence, despite the fact that Castille *personally authorized* pursuit of the death penalty in Williams's case, and despite the fact that the issue on appeal was whether attorneys on his staff had engaged in gross misconduct, Castille declined to recuse himself or refer the motion to the full court. Instead, he joined the court's opinion reversing the grant of relief and wrote a separate concurrence in which he excoriated both the attorneys who helped Williams seek that relief and the post-conviction court. By deciding to judge the conduct of his own office in a case in which he was personally involved, Castille created a judicial conflict so obvious and so extreme that it violated the Due Process Clause's guarantee of an impartial justice system.

By the time our nation's Founders drafted our enduring Constitution, the importance of impartial adjudicators was a bedrock principle of the common law and one reflected in many of the early state constitutions. When the Framers drafted the Constitution, they expanded upon this heritage and fully embraced the importance of impartial adjudication as central to a fair justice system, incorporating into the Fifth Amendment the promise that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. const. amend. V.

This commitment was magnified in the years after the Civil War as the Framers of the Fourteenth Amendment witnessed, among other things, widespread maladministration of justice in the South that meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. As a result, the Framers renewed the constitutional promise of due process in the Fourteenth

Amendment, providing that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. const. amend. XIV § 1. Representative Bingham, principal drafter of Section 1 of that Amendment, explained it this way: the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court has repeatedly reaffirmed that promise, recognizing that the Due Process Clause's proscription on biased judges encompasses all cases in which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). As this Court has explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.*

The Due Process Clause requires such a stringent standard because "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. "[T]o perform its high function in the best way," this Court has said, "'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Thus, to determine whether any given judicial conflict violates the Due Process Clause, this Court asks whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudg-

ment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The interest in this case plainly does. Chief Justice Ronald Castille was the Philadelphia District Attorney and thus head of the office that prosecuted Williams throughout Williams's trial, sentencing, and direct appeal. Indeed, Castille personally approved pursuit of the death penalty against Williams, and his name appeared on the appellate brief asking that Williams's conviction be affirmed. And if these facts were not alone enough to warrant recusal, the issue Castille was asked to decide in this case is whether the trial prosecutor in Williams's case—that is, an attorney on Castille's staff and for whose conduct Castille was ultimately responsible—suppressed evidence in violation of the law, as the lower court found. An affirmance of the lower court's order would necessarily impugn the integrity and reputation of the office Castille led and thus his own reputation, as well. It is no insult to Castille to say that "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* (quoting *Withrow*, 421 U.S. at 47). For a judge with that level of personal interest in a case to participate in deliberations, potentially influence his colleagues' votes, and then vote on the case himself creates not only the appearance of unfairness, but also the probability of it, both of which the Due Process Clause prohibits.

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES BOTH THE REALITY AND THE PERCEPTION OF A FAIR AND IMPARTIAL JUSTICE SYSTEM

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. const. amends. V, XIV § 1. These Amendments' explicit embrace of "due process of law" reflects our national commitment to an impartial judicial system, one in which judges "hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532.

A. The History of the Due Process Clause Shows a Particular Concern for Ensuring Unbiased Decisionmakers.

By the time the Framers drafted our enduring Constitution, the idea that judges should be impartial was already well-established. Dating at least as far back as the early seventeenth century, English common law recognized that impartial adjudicators were essential to the fair administration of justice, allowing disqualification in cases in which judges had a direct pecuniary interest in a case. *See, e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P. 1610); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). One English jurist argued that an even broader conception of bias would better ensure the fair and impartial administration of justice, stating that a "judge should disqualify . . . if he is related to a party, if he is hostile to a party, if he has been counsel in the case." Frank, *supra*, at 610 n.13.

This commitment to fair and impartial adjudicators was reflected in state constitutions adopted prior to the drafting of the Constitution. The Maryland

Declaration of Rights of 1776, for example, stated that "the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people." Yale Law School, The Avalon Project, Constitution of Maryland—November 11, 1776, at art. XXX, http://avalon.law.yale.edu/17th_century/ma02.asp (last visited Dec. 2, 2015). Similarly, the Massachusetts Declaration of Rights of 1780 provided that "[i]t is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." National Humanities Institute, Constitution of Massachusetts 1780, at art. XXIX, http://www.nhinet.org/ccs/docs/ma-1780.htm (last visited Dec. 2, 2015).

Building and expanding upon this English common law heritage, the Framers fully embraced the importance of impartial adjudication as central to a fair justice system. *See, e.g.*, Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 Iowa L. Rev. 181, 183 (2011) ("[t]he notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice"). As James Madison wrote in *The Federalist*, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999). Indeed, the Article III provision of life tenure for members of the federal judiciary was one manifestation of this belief in the importance of impartial and independent adjudicators. U.S. const. art. III § 1.

This interest in securing impartial justice was of particular concern to the drafters of the Fourteenth Amendment's Due Process Clause because they acted at a time when widespread maladministration of jus-

tice in the South meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (1866) (remarks of Rep. Bingham); *id.* at 1263 (remarks of Rep. Broomall); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (remarks of Sen. Trumbull) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty or property").

Moreover, the drafters of the Fourteenth Amendment were also keenly aware of the injustices wrought in the North by the federal Fugitive Slave Act of 1850. Under that law, the commissioner who decided whether the person brought before him was a fugitive slave received $10 for returning a purported slave, but only $5 for declaring him free. *See* Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850); Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) (remarks of Sen. Sumner) ("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him to freedom, his dole is $5."); Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) (remarks of Rep. Bingham) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power . . . to irresponsible commissioners . . . tendering them a bribe of five dollars if . . . he shall adjudge a man brought before him on his warrant a fugitive slave"); *see generally* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 40 (1986).

Because the Fugitive Slave Act deprived black defendants of basic fair-trial rights, including "an unbiased decision-maker," this issue "heightened aboli-

tionists' sensitivity to fair procedure." Akhil Reed Amar, The Bill of Rights 278 (1998); *see also* Akhil Reed Amar, America's Constitution: A Biography 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850"). Thus, the drafters of the Fourteenth Amendment renewed the national commitment to impartial justice and imposed its proscriptions on the states by including in the Fourteenth Amendment the guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As Representative Bingham, principal drafter of Section 1 of the Fourteenth Amendment, explained, the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

B. This Court's Precedents Confirm That the Due Process Clause Requires Impartial Adjudicators.

This Court has long applied the Due Process Clause to guarantee the impartial adjudicators the Framers of the Fourteenth Amendment found lacking in some Civil War-era courts. In so doing, this Court has recognized that the Due Process Clause's proscription extends more broadly than the common law prohibition on judges serving in cases in which they have a direct pecuniary interest, but rather encompasses those cases in which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. As this Court explained most recently in *Caperton*, "[a]s new problems have emerged that were not discussed at common law . . . the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which experi-

ence teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" 556 U.S. at 877 (quoting *Withrow*, 421 U.S. at 47).

In *Tumey v. Ohio*, the Court considered a situation in which the judge had a financial interest, albeit a small one, in the outcome of the case because he would receive a supplement to his salary if he convicted the defendant. There, the Court held that the judge should have been disqualified "both because of his direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village." 273 U.S. at 535 (emphasis added). As the Court explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532. Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.*

In a subsequent case, the Court underscored that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). Again, the Court emphasized that "the test" is whether the judge might be tempted "'not to hold the balance nice, clear, and true.'" *Id.* (quoting *Tumey*, 273 U.S. at 532). Thus, in that case, the Court held that it violated Due Process for a mayor to convict a defendant of traffic offenses where the fines from those offenses would help support the village of

which he was mayor. *Id.* at 59; *see id.* at 60 ("that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court"). Any other result, the Court concluded, would have denied the defendant the "neutral and detached judge" to which he was entitled. *Id.* at 62.

In *In re Murchison*, the Court considered a case in which the judge had no financial interest in the case, but was nonetheless too interested in the outcome to participate in its adjudication consistent with the requirements of the Due Process Clause. In that case, the question was whether a judge who acted as a "'one-man grand jury'" and questioned a witness in that capacity could then preside over a contempt hearing that arose out of that grand jury proceeding. 349 U.S. at 133. The Court said no and elaborated at length on why the Due Process Clause prohibits judicial conflicts of interest that involve not just the reality, but also the appearance, of bias.

As the Court explained, "[a] fair trial in a fair tribunal is a basic requirement of due process," and "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136. This is why "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* The Court recognized that "[t]hat interest cannot be defined with precision. Circumstances and relationships must be considered." *Id.*

To be sure, the Court acknowledged, "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in

the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt*, 348 U.S. at 14); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("We make clear that we are not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not . . . hold the balance nice, clear and true.'"" (quoting *Ward*, 409 U.S. at 60) (first two alterations in original)); *Withrow*, 421 U.S. at 47 ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (quoting *In re Murchison*, 349 U.S. at 136)). The reason for this emphasis on the appearance of justice is simple: as this Court has explained, "[t]he power and the prerogative of a court to [elaborate principles of law] rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002).

Most recently, in *Caperton*, this Court reiterated that the common law proscription on judges serving in cases in which they have a direct pecuniary interest does not identify the outer limits of the Due Process Clause's protections. Nor is the application of the Due Process Clause limited to cases involving actual bias. 556 U.S. at 883 ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias"). As the Court explained, "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.

Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Id.* Thus, in deciding whether a judicial conflict violates the Due Process Clause, the question the Court asks is whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47); *id.* at 884 (holding that the Due Process Clause was violated where "there is a serious risk of actual bias—based on objective and reasonable perceptions"). It plainly does in this case, as the next Section discusses.

II. THE JUDICIAL CONFLICT OF INTEREST IN THIS CASE WAS SO OBVIOUS AND EXTREME AS TO VIOLATE THE DUE PROCESS CLAUSE'S GUARANTEE OF AN IMPARTIAL ADJUDICATOR.

As just discussed, a conflict of interest inquiry under the Due Process Clause asks whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47). The judicial conflict at issue in this case was both so extreme and so obvious that there can be no doubt that it posed such a risk and thus denied Williams the fair proceeding to which he was entitled under the Due Process Clause.

At the time of Williams's trial, sentencing, and direct appeal, Chief Justice Castille was the Philadelphia District Attorney and thus head of the office that was responsible for prosecuting Williams. In-

deed, Castille was no mere figurehead; he *personally* approved pursuit of the death penalty against Williams. Further, when Williams's case was on direct appeal, then-District Attorney Castille was one of the listed counsel on the brief asking the Pennsylvania Supreme Court to affirm his conviction.

These facts alone are sufficient to require recusal in this case for reasons that the Court made clear in *In re Murchison*. There, the Court explained that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." 349 U.S. at 137. "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* Indeed, the Court explained that "[w]hile he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* (internal footnote omitted). Here, that is exactly what happened. Castille was one of the prosecutors responsible for Williams's conviction and death sentence, and yet he then went on to judge the validity of that sentence.

In *Murchison*, the Court also made clear a practical reason why prosecutors who move to the bench should not be allowed to review the cases in which they were previously involved: "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." *Id.* at 138. That is surely no less true here. As head of the dis-

trict attorney's office, Castille may not have been involved in the day-to-day details of the case, but he almost certainly was made privy to the internal deliberations of those who were so involved when he personally approved pursuit of the death penalty in the case. To aid him in that decision, Castille reviewed a memorandum that included a factual summary of the case, as well as a discussion of aggravating and mitigating factors in the case—all obviously presented from the perspective of the prosecutors in the case. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Caperton*, 556 U.S. at 883 (internal quotations omitted), it is difficult to imagine that Castille could put everything he learned from that memorandum out of his mind and approach the briefing in this case with a clean slate.

Moreover, even if that level of involvement were not sufficient to warrant recusal (and *amicus* believes that it is), recusal is plainly warranted here by virtue of the nature of the legal issue that was on appeal. In this case, Castille was not asked to resolve some generic dispute about the meaning of the law; rather, he was asked to assess whether the trial prosecutor in this case—a prosecutor under *his* supervision—violated her legal obligations to disclose evidence to Williams. Indeed, Castille was asked to assess whether a prosecutor in *his* office had engaged in such gross misconduct that the court below concluded she had "[i]ntentionally root[ed] evidence out of [the] prosecution in order to secure a first degree murder conviction and death penalty sentence." J.A. 75a n.23; *see id.* at 155a (post-conviction court also described trial prosecutor's decisions as a "'penalty phase by ambush'").

Given those sorts of attacks on the office he led, an objective observer could not help but conclude that

Castille would have felt that he and his reputation were also under attack. Indeed, in his opinion concurring in his court's decision reversing the grant of relief, Castille did not just disagree with the court below, he attacked it for engaging in "extraordinary, and unauthorized, measures" to grant relief based on claims that he deemed "time-barred and frivolous." 39a. And Castille's attacks did not end there: he also chastised the attorneys who brought the claims, accusing them of "pursuing an obstructionist anti-death penalty agenda" and "anoint[ing] themselves as a statewide, *de facto* capital defender's office." *Id.* at 42a-43a. Whatever one may think of the merits or timeliness of Williams's claims, the point is simply that Castille's opinion suggests he disagreed vehemently with the lower court's decision to grant relief. And no wonder: that decision impugned the integrity and reputation of the office he led and, by association, his own integrity and reputation. It is difficult to see how review of such a decision would not "offer a possible temptation to the average man as a judge to . . . not . . . hold the balance nice, clear, and true between the state and the accused." *Tumey*, at 532.

Finally, it should be of no moment that Castille's vote was not dispositive, because his views on the case and its merits may well have influenced his colleagues on the bench—and a reasonable person certainly should have concluded that they might at the time Castille made the recusal decision. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82, 100 (1986) ("most group decisionmaking includes the exchange of ideas and arguments under circumstances that are calculated to affect individual views"); Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159, 1195-

96 (2008) ("the circulation of memos and draft opinions has caused Justices to change their views in a large number of cases, and this in turn has changed the outcome in some cases"). There is, of course, no way to know for sure the effect his participation in deliberations had on his colleagues, but the very possibility that it did have some effect means that Castille's significant conflict of interest taints the decision of the entire court just as much as if his vote had been dispositive.

As this Court has recognized, "to perform its high function in the best way justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136 (internal quotations omitted). It did not do so here.

CONCLUSION

For the foregoing reasons, the Court should reverse Chief Justice Castille's decision not to recuse himself, vacate the judgment of the Supreme Court of Pennsylvania, and remand for further proceedings without Chief Justice Castille's participation.

Respectfully submitted,

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